CONSTITUTIONALITY

OF THE CONSCRIPT ACT.

ATLANTA, 1862.

CORRESPONDENCE

BETWEEN

GOVERNOR BROWN

AND

PRESIDENT DAVIS,

ON

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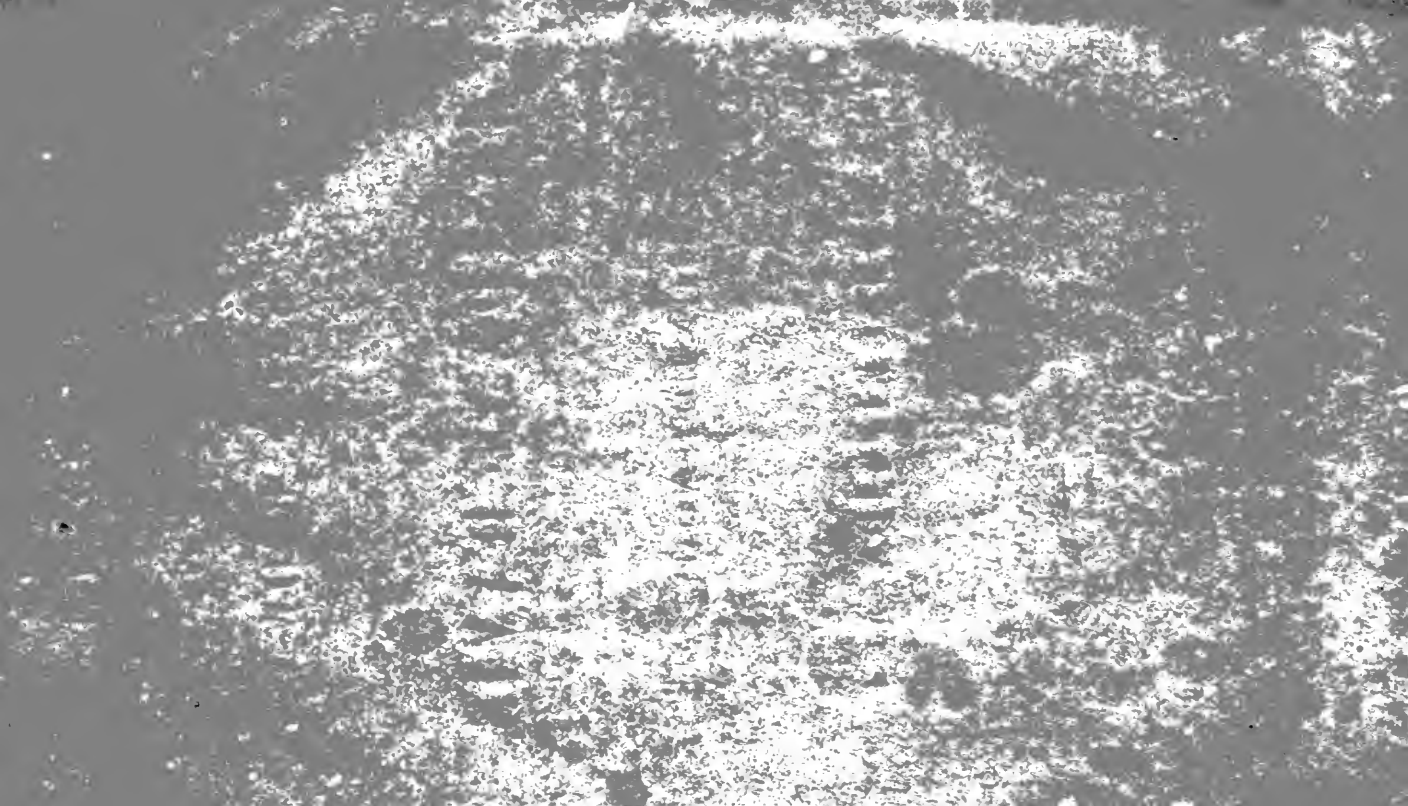

CORRESPONDENCE.

EXECUTIVE DEPARTMENT,
MILLEDGEVILLE, GA., APRIL 22d, 1862.

HIS EXCELLENCY JEFFERSON DAVIS,
Richmond, Virginia:

Dear Sir: So soon as I received from the Secretary of War official notice of the passage, by Congress, of the Conscription Act, placing in the military service of the Confederate States all white men between the ages of 18 and 35 years, I saw that it was impossible for me longer to retain in the field the Georgia State troops, without probable collision and conflict with the Confederate authorities, in the face of the enemy. I, therefore, acquiesced in the necessity which compelled me to transfer the State forces to the command of the Confederate General at Savannah, and tendered to General Lawton, who commands the Military District of Georgia, not only the Conscripts in the State Army, but, also, those not Conscripts, for the unexpired term of their enlistment. General Lawton accepted the command with the assurance that he would interfere as little as possible with the company and regimental organizations of the troops. This assurance, I trust, the Government will permit him to carry out in the same spirit of liberality in which it was given. If the State Regiments are broken up and the Conscripts belonging to them forced into other organizations against their consent, it will have a very discouraging effect. If the Regiments and Companies were preserved, and permission given to the officers to fill up their ranks by recruits, there would be no doubt of their ability to do so; and I think they have a just right to expect this privilege.

Georgia has promptly responded to every call made upon her by you for troops, and has always given more than you asked;

she now has about 60,000 in the field. Had you called upon her Executive for 20,000 more, (if her just quota,) they would have been furnished without delay. The plea of necessity, so far, at least, as this State is concerned, cannot be set up in defence of the Conscription Act.

When the Government of the United States disregarded and attempted to trample upon the rights of the States, Georgia set its power at defiance and seceded from the Union, rather than submit to the consolidation of all power in the hands of the Central or Federal Government.

The Conscription Act not only puts it in the power of the Executive of the Confederacy to disorganize her troops, which she was compelled to call into the field, for her own defence, in addition to her just quota, because of the neglect of the Confederacy to place sufficient troops upon her coast for her defence—which would have required less than half the number she has sent to the field—but, also, places it in his power to destroy her State Government by disbanding her law-making power.

The Constitution of this State makes every male citizen who has attained the age of 21 years eligible to a seat in the House of Representatives of the General Assembly, and every one who has attained the age of 25 eligible to a seat in the Senate.—There are a large number of the members of the General Assembly between the ages of 18 and 35. They are white citizens of the Confederate States, and there is no statute in the State, and I am aware of none in the Confederate States Code, which exempts them from military duty. They, therefore, fall within the provisions of the Conscription Act. It may become necessary for me to convene the General Assembly in extra session; or, if not, the regular session will commence the first Wednesday in November. When the members meet at the Capitol, if not sooner, they might be claimed as Conscripts by a Confederate officer, and arrested with a view to carry them to some remote part of the Confederacy, as recruits, to fill up some Company now in service. They have no military power, and could only look to the Executive of the State for military protection; and I cannot hesitate to say that, in such case, I should use all the remaining military force of the State in defence of a co-ordinate Constitutional branch of the Government. I can, there-

fore, permit no enrollment of the members of the General Assembly under the Conscription Act. The same is true of the Judges of the Supreme and Superior Courts should any of them fall within the ages above mentioned; and of the Secretaries of the Executive Department; the heads and necessary clerks of the other Departments of the State Government; and the Tax Collectors and Receivers of the different counties, who are now in the midst of their duties, and are not permitted by law to supply substitutes, and whose duties must be performed, or the revenues of the State cannot be collected. The same remark applies to the Staff of the Commander-in-Chief. There is no statute exempting them from military duty, for the reason that they are at all times subject to the command of the Governor, and are not expected to go into the ranks.

The State's Quartermaster, Commissary, Ordnance and Engineers' Departments, fall within the same rule. The Major Generals, Brigadier Generals, and other officers of the Militia, would seem to be entitled to like consideration.

Again—the Western and Atlantic Rail Road is the property of the State, and is under the control and management of the Governor. It is a source of revenue to the State, and its successful management is a matter of great military importance, both to the State and the Confederacy. I now have an efficient force of officers and workmen upon the Road, and must suspend operations if all between 18 and 35 are taken away from the Road.

I would, also, invite your attention to the further fact that the State owns and controls the Georgia Military Institute, at Marietta, and now has in the Institute over 125 Cadets, a large proportion of whom are within the age of Conscripts. If they are not exempted, this most important Institution is broken up. I must not omit, in this connection, the students of the State University, and of the other Colleges of the State. These valuable Institutions of learning must also be suspended if the law is enforced against the students.

I would, also, respectfully call your attention to the further fact that in portions of our State where the slave population is heavy, almost the entire white male population capable of bearing arms, except the overseers on the plantations, are now in

the military service of the Confederacy. Most of these overseers are over 18 and under 35. If they are carried to the field, thousands of slaves must be left without overseers, and their labor not only lost at a time when there is great need of it in the production of provisions and supplies for our armies, but the peace and safety of helpless women and children must be imperiled for want of protection against bands of idle slaves, who must be left to roam over the country without restraint.

It is also worthy of remark, that a large proportion of our best mechanics, and of the persons engaged in the various branches of manufacturing now of vital importance to the success of our cause, are within the ages which subject them to the provisions of the Conscription Act.

My remark that I cannot permit the enrollment of such State officers as are necessary to the existence of the State Government, and the working of the State Road, does not, of course, apply to persons engaged in the other useful branches of industry considered of paramount importance, but I must ask, in justice to the people of this State, that such exemptions among these classes be made as the public necessities may require.

As you are well aware, the military operations of the Government cannot be carried on without the use of all our Rail Roads, and the same necessity exists for the exemption of all other Rail Road officers and workmen which exists in the case of the State Road.

There are doubtless other important interests not herein enumerated which will readily occur to you, which must be kept alive or the most serious consequences must ensue.

The Constitution gives to Congress the power to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the Confederate States, *reserving to the States, respectively, the appointment of the officers*, and the authority of *training* the militia according to the discipline prescribed by Congress. The Conscription Act gives the President the power to enroll the entire militia of the States between 18 and 35, and takes from the States their constitutional right to *appoint the officers* and to *train* the militia.

While this act does not leave to the States the appointment

of a single officer to command the militia employed in the service of the Confederate States under its provisions, it places it in the power of the President to take a Major General of the Militia of a State, if he is not 35 years of age, and place him in the ranks of the Confederate States army, under the command of a 3rd Lieutenant appointed by the President, and to treat him as a deserter if he refuses to obey the call and submit to the command of the subaltern placed over him.

I do not wish to be understood, in any portion of this letter, to refer to the intentions of the President, but only to the extraordinary powers given him by the Act.

This Act not only disorganizes the military system of all the States, but consolidates almost the entire military power of the States in the Confederate Executive with the appointment of the officers of the militia, and enables him at his pleasure to cripple or destroy the civil government of each State, by arresting and carrying into the Confederate service the officers charged by the State Constitution with the administration of the State Government.

I notice by a perusal of the Conscription Act that the President may, with the consent of the Governors of the respective States, employ State officers in the enrollment of the Conscripts. While I shall throw no obstacle in the way of the general enrollment of persons embraced within the Act, except as above stated, I do not feel that it is the duty of the Executive of a State to employ actively the officers of the State in the execution of a law which virtually strips the State of her constitutional military powers, and, if fully executed, destroys the Legislative Department of her Government, making even the sessions of her General Assembly dependent upon the will of the Confederate Executive. I therefore respectfully decline all connection with the proposed enrollment, and propose to reserve the question of the constitutionality of the Act, and its binding force upon the people of this State, for their consideration at a time when it may less seriously embarrass the Confederacy in the prosecution of the war.

You will much oblige by informing me of the extent to which you propose making exemptions, if any, in favor of the interests above mentioned, and such others as you may consider of vital

importance. The question is one of great interest to our people, and they are anxious to know your pleasure in the premises.

Very respectfully,

Your obedient servant,

JOSEPH E. BROWN.

RICHMOND, APRIL 28th, 1862.

To His EXCELLENCY JOSEPH E. BROWN,

Governor of the State of Georgia:

Dear Sir:—I have received your letter of the 22d inst., informing me of your transfer of the Georgia State troops to General Lawton, commanding Confederate forces at Savannah—suggesting that there be as little interference as possible on the part of the Confederate authorities with the present organization of those troops—and mentioning various persons and classes as proper subjects for exemption from military service under the provisions of an "Act to further provide for the public defence," approved on the 16th inst.

I enclose copies of the Act for receiving State troops tendered, as organized, and of the Exemption Act. By the first, interference with the present organization of Companies, Squadrons, Battalions or Regiments, tendered by Governors of States, is specially disclaimed. By the other, exemptions are made which explain (satisfactorily, I trust,) the policy of Congress with regard to the persons and interests you specify.

The constitutionality of the Act you refer to as the "Conscription Bill," is clearly not derivable from the power to call out the militia, but from that to raise armies. With regard to the mode of officering the troops now called into the service of the Confederacy, the intention of Congress is to me, as to you, to be learned from its Acts; and, from the terms employed, it would seem that the policy of election by the troops themselves is adopted by Congress.

With great regard, very respectfully,

Your obedient servant,

JEFFERSON DAVIS.

EXECUTIVE DEPARTMENT,
MILLEDGEVILLE, GA., MAY 9, 1862.

HIS EXCELLENCY JEFFERSON DAVIS:

Dear Sir: I have the honor to acknowledge the receipt of your favor of the 28th ult., in reply to my letter to you upon the subject of the Conscription Act. I should not trouble you with a reply, were it not that principles are involved of the most vital character, upon the maintenance of which, in my opinion, depend not only the rights and the sovereignty of the States, but the very existence of State Government.

While I am always happy as an individual to render you any assistance in my power, in the discharge of the laborious and responsible duties assigned you, and while I am satisfied you will bear testimony that I have never, as the Executive of this State, failed in a single instance to furnish all the men, and more than you have called for, and to assist you with all the other means at my command, I cannot consent to commit the State to a policy which is in my judgment subversive of her sovereignty, and at war with all the principles for the support of which Georgia entered into this revolution.

It may be said that it is no time to discuss constitutional questions in the midst of revolution, and that State rights and State sovereignty must yield for a time to the higher law of necessity. If this be a safe principle of action, it cannot certainly apply till the necessity is shown to exist; and I apprehend it would be a dangerous policy to adopt, were we to admit that those who are to exercise the power of setting aside the Constitution, are to be the judges of the necessity for so doing. But did the necessity exist in this case? The Conscription Act cannot aid the Government in increasing its supply of *arms* or *provisions*, but can only enable it to call a larger number of *men* into the field. The difficulty has never been to get *men*. The States have already furnished the Government more than it can arm, and have from their own means armed and equipped very large numbers for it. Georgia has not only furnished more than you have asked, and armed and equipped, from her own treasury, a large proportion of those she has sent to the field, but she stood ready to furnish promptly her quota (organized as the Constitution provides) of any additional number called for by the President.

I beg leave again to invite your attention to the constitutional question involved. You say in your letter, that the constitutionality of the act is clearly not derivable from the power to call out the militia, but from that to raise armies. Let us examine this for a moment. The 8th section of the 1st article of the Constitution defines the powers of Congress. The 12th paragraph of that section declares, that Congress "shall have power to raise and support armies." Paragraph 15 gives Congress power to provide for calling forth the militia to execute the laws of the Confederate States, suppress insurrections, and *repel invasions*. Paragraph 16 gives Congress power to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the Confederate States, *reserving to the States respectively the appointment of the officers*, and the authority of *training* the militia according to the discipline prescribed by Congress.

These grants of power all relate to the same subject matter, and are all contained in the same section of the Constitution, and by a well known rule of construction, must be taken as a whole and construed together.

It would seem quite clear, that by the grant of power to Congress to raise and support armies, without qualification, the framers of the Constitution intended the regular armies of the Confederacy, and not armies composed of the whole militia of all the States. If all the power given in the three paragraphs above quoted, is in fact embraced in the first, in the general words *to raise armies*, then the other two paragraphs are mere surplusage, and the framers of the Constitution were guilty of the folly of incorporating into the instrument unmeaning phrases. When the States, by the 16th paragraph, expressly and carefully reserved to themselves the right to appoint the officers of the militia, when employed in the service of the Confederate States, it was certainly never contemplated that Congress had power, should it become necessary, to call the whole militia of the State into the service of the Confederacy, to direct that the President should appoint (commission) all the officers of the militia thus called into service, under the general language contained in the previous grant of power to *raise armies*. If this can be done, the very object of the State in reserving the pow-

er of appointing the officers is defeated, and that portion of the Constitution is not only a nullity, but the whole military power of the States, and the entire control of the militia, with the appointment of the officers, is vested in the Confederate Government, whenever it chooses to call its own action "raising an army," and not "calling forth the militia." Is it fair to conclude that the States intended that their reserved powers should be defeated in a matter so vital to constitutional liberty, by a mere change in the use of terms to designate the act? Congress shall have power to *raise armies*. How shall it be done? The answer is clear. In conformity to the provisions of the Constitution which expressly provides that, when the militia of the States are called forth to *repel invasions*, and employed in the service of the Confederate States, (which is now the case,) the States shall appoint the officers. If this is done, the army is raised as directed by the Constitution, and the reserved rights of the States are respected; but, if the officers of the militia, when called forth, are appointed by the President, the army composed of the militia is not raised as directed by the Constitution, and the reserved rights of the States are disregarded. The fathers of the Republic in 1787, showed the utmost solicitude on this very point. In the discussions in the Convention upon the adoption of this paragraph in the Constitution of the United States, which we have copied and adopted without alteration, Mr. Ellsworth said:— "The whole authority over the militia ought by no means to be taken away from the States, whose consequence would pine away to nothing after such a sacrifice of power." In explanation of the power which the committee, who reported this paragraph to the Convention, intended by it to delegate to the General Government, when the militia should be employed in the service of that Government, Mr. King, a member of the committee, said: "By *organizing*, the committee meant proportioning the officers and men; by *arming*, specifying the kind, size and calibre of arms; by *disciplining*, prescribing the manual exercise, evolutions, &c."

Mr. Gerry objected to the delegation of the power, even with this explanation, and said: "This power in the United States, as explained, is making the States drill sergeants. He had as lief let the citizens of Massachusetts be disarmed, as to take the

command from the States, and subject them to the General Legislature."

Mr. Madison observed, that "*arming*, as explained, did not extend to furnishing arms, nor the term *disciplining*, to penalties and courts martial for enforcing them."

After the adoption by the Convention of the first part of the clause, Mr. Madison moved to amend the next part of it, so as te read "reserving to the States respectively the appointment of the officers, *under the rank of general officers*."

Mr. Sherman considered this as absolutely inadmissible. He said that "if the people should be so far asleep as to allow the most influential officers of the militia to be appointed by the General Government, every man of discernment would rouse them by sounding the alarm to them."

Upon Mr. Madison's proposition, Mr. Gerry said: "Let us at once destroy the State Governments, have an Executive for life, or hereditary, and a proper Senate, and then there would be some consistency in giving full powers to the General Government; but as the States are not to be abolished, he wondered at the attempts that were made to give powers inconsistent with their existence. He warned the Convention against pushing the experiment too far."

Mr. Madison's amendment to add to the clause the words "*under the rank of general officers*," was voted down by a majority of eight States against three, according to the "Madison Papers," from which the above extracts are taken; and by nine States against two, according to the printed journals of the Convention. The reservation in the form in which it now stands in the Constitution, "reserving to the States the appointment of the officers," when the militia are employed in the service of the Confederacy, as well the general officers as those under that grade, was then adopted unanimously by the Convention.

At the expense of wearying your patience, I have been thus careful in tracing the history of this clause of the Constitution, to show that it was the clear understanding of those who originated this part of the fundamental law, that the States should retain their power over their militia, even while in the service of the Confederacy, by retaining the appointment of *all the officers*.

In practice, the Government of the United States, among

other numerous encroachments of power, had usurped to itself the power which the Convention, after mature deliberation, had expressly denied to it, to wit: the power of appointing the *general officers* of the militia, when employed in the service of the General Government.

But even that Government had never attempted to go to the extent of usurping the power to appoint the field and company officers. If the framers of the Constitution were startled at the idea of giving the appointment of the general officers to the General Government, and promptly rejected it, how would they have met a proposition to give the appointment of ALL THE OFFICERS, down to the lowest lieutenant, to it?

But you say, "with regard to the mode of officering the troops now called into the service of the Confederacy, the intention of Congress is to be learned from its acts; and from the terms employed it would seem that the policy of election by the troops themselves, is adopted by Congress."

I confess I had not so understood it, without very essential qualification. It is true, the twelve-months men who re-enlist have a right, within forty days, to re-organize and elect their officers.

But if I understand the act, judging from the terms used, all vacancies which occur in the old regiments are to be filled, not by election, but by the President, by promotion, down to the lowest commissioned officer, whose vacancy alone is filled by election, and even this rule of promotion may be set aside by the President at any time, under circumstances mentioned in the act, and he may appoint any one he pleases to fill the vacancy, if, in his opinion, the person selected is distinguished for skill or valor; and the commission in either, and all the cases mentioned, must be issued by the President.

Quite a number of Georgia regiments are in for the war, whose officers hold commissions from the Executive of the State; but even in these regiments, under the act, every person appointed to fill any vacancy which may hereafter occur, must, it would seem, hold his commission, not from the State, but from the President.

But admit that Congress, by its acts, intended to give the troops in every case the right to elect their officers (which has

not been the established practice, as you have commissioned many persons to command as field officers without election,) this does not relieve the acts of Congress from the charge of violation of the Constitution. The question is not as to the mode of selecting the person who is to have the commission, but as to the Government which has, under the Constitution, the right to issue the commission. The States, in the exercise of their reserved power to appoint the officers, may select them by election, or may permit the Executive to select them; but the appointment rests upon the commission, as there is no complete appointment till the commission is issued; and, therefore, the Government that issues the commission exercises the appointing power, and controls the appointment.

I am not, however, discussing the intention of Congress in the assumption of this power, but only the question of its *powers;* and whatever may have been its intention, I maintain that it has transcended its constitutional powers, and has placed in the hands of the Executive of the Confederacy that which the States have expressly and carefully denied to Congress and reserved to themselves.

But you may ask, why hold the Executive responsible for the unconstitutional action of Congress? I would not, of course, insist on this any further than the action of Congress has been *sanctioned* by the Executive, and acted upon by him.

Feeling satisfied that the Conscription Act, and such other acts of Congress as authorize the President to appoint or commission the officers of the militia of the State, when employed in the service of the Confederate States to "repel invasion," are in palpable violation of the Constitution, I can consent to do no act which commits Georgia to willing acquiescence in their binding force upon her people. I cannot, therefore, consent to have anything to do with the enrollment of the conscripts in this State; nor can I permit any commissioned officer of the militia to be enrolled, who is necessary to enable the State to exercise her reserved right of *training* her militia, according to the discipline prescribed by Congress, at a time when to prevent troubles with her slaves, a strict military police is absolutely necessary to the safety of her people. Nor can I permit any other officer, civil or military, who is necessary to the maintenance of

the State Government, to be carried out of the State as a conscript.

Should you at any time need additional troops from Georgia to fill up her just quota, in proportion to the number furnished by the other States, you have only to call on the Executive for the number required, to be organized and officered as the Constitution directs, and your call will, as it ever has done, meet a prompt response from her noble and patriotic people, who, while they will watch with a jealous eye, even in the midst of revolution, every attempt to undermine their constitutional rights, will never be content to be behind the foremost in the discharge of their whole duty. I am, with great respect,

Your obedient servant,
JOSEPH E. BROWN.

EXECUTIVE DEPARTMENT,
RICHMOND, MAY 29th, 1862.

Dear Sir: I received your letter of the 8th inst., in due course, but the importance of the subject embraced in it required careful consideration; and this, together with other pressing duties, has caused delay in my reply.

The constitutional question discussed by you in relation to the Conscription Law had been duly weighed before I recommended to Congress the passage of such a law; it was fully debated in both houses; and your letter has not only been submitted to my Cabinet, but a written opinion has been required from the Attorney-General. The constitutionality of the law was sustained by very large majorities in both houses. This decision of the Congress meets the concurrence, not only of my own judgment, but of every member of the Cabinet; and a copy of the opinion of the Attorney-General, herewith enclosed, develops the reasons on which his conclusions are based.

I propose, however, from my high respect for yourself, and for other eminent citizens who entertain opinions similar to yours, to set forth, somewhat at length, my own views on the power of the Confederate Government over its own armies and

the militia, and will endeavor not to leave without answer any of the positions maintained in your letter.

The main, if not the only purpose for which independent States form Unions or Confederations, is to combine the power of the several members in such manner as to form one united force in all relations with foreign powers, whether in peace or in war. Each State amply competent to administer and control its own domestic government, yet too feeble successfully to resist powerful nations, seeks safety by uniting with other States in like condition, and by delegating to some common agent the combined strength of all, in order to secure advantageous commercial relations in peace and to carry on hostilities with effect in war.

Now, the powers delegated by the several States to the Confederate Government, which is their common agent, are enumerated in the 8th section of the Constitution, each power being distinct, specific, and enumerated in paragraphs separately numbered. The only exception is the 18th paragraph, which, by its own terms, is made dependent on those previously enumerated, as follows:

"18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers," &c.

Now, the *war powers* granted to the Congress are conferred in the following paragraphs:

No. 1 gives authority to raise "revenue necessary to pay the debts, *provide for the common defence*, and carry on the government," &c.

No. 11, "*to declare war*, grant letters of marque and reprisal, and make rules concerning captures on land and water;"

No. 12, "*to raise and support armies*; but no appropriation of money to that use shall be for a longer term than two years."

No. 13, "*to provide and maintain a navy*;"

No. 14, "to make rules for the government and regulation of the *land and naval forces*."

It is impossible to imagine a more broad, ample and unqualified delegation of the whole war power of each State than is here contained, with the solitary limitation of the appropriations to two years. The States not only gave power to raise money for the common defence; to declare war; to raise and support ar-

mies (in the plural); to provide and maintain a navy; to govern and regulate both land and naval forces; but they went further, and covenanted, by the 3d paragraph of the 10th section, not "to engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

I know of but two modes of raising armies within the Confederate States, viz: voluntary enlistment, and draft or conscription. I perceive, in the delegation of power to raise armies, no restriction as to the mode of procuring troops. I see nothing which confines Congress to one class of men, nor any greater power to receive volunteers than conscripts into its service. I see no limitation by which enlistments are to be received of individuals only, but not of companies, or battalions, or squadrons, or regiments. I find no limitation of time of service, but only of duration of appropriation. I discover nothing to confine Congress to waging war within the limits of the Confederacy, nor to prohibit offensive war. In a word, when Congress desires to raise an army, and passes a law for that purpose, the solitary question is under the 18th paragraph, viz: "Is the law one that is necessary and proper to execute the power to raise armies," &c?

On this point you say: "But did the necessity exist in this case?" The Conscription Act cannot aid the Government in increasing the supply of *arms* or *provisions*, but can only enable it to call a larger number of *men* into the field. The difficulty has never been to get *men*. The States have already furnished the Government more than it can arm," &c.

I would have very little difficulty in establishing to your entire satisfaction that the passage of the law was not only necessary, but that it was absolutely indispensable; that numerous regiments of twelve months men were on the eve of being disbanded, whose places could not be supplied by new levies in the face of superior numbers of the foe, without entailing the most disastrous results; that the position of our armies was so critical as to fill the bosom of every patriot with the liveliest apprehension; and that the provisions of this law were effective in warding off a pressing danger. But I prefer to answer your objection on other and broader grounds.

I hold, that when a specific power is granted by the Constitu-

tion, like that now in question, "to raise armies," Congress is the judge whether the law passed for the purpose of executing that power, is "necessary and proper." It is not enough to say that armies might be raised in other ways, and that, therefore, this particular way is not "necessary." The same argument might be used against *every* mode of raising armies. To each successive mode suggested, the objection would be that other modes were practicable, and that, therefore, the particular mode used was not "necessary." The true and only test is to enquire whether the law is intended and calculated to carry out the object; whether it devises and creates an instrumentality for executing the specific power granted; and if the answer be in the affirmative, the law is constitutional. None can doubt that the Conscription Law is calculated and intended to "raise armies." It is, therefore, "necessary and proper" for the execution of that power, and is constitutional, unless it comes into conflict with some other provision of our Confederate Compact.

You express the opinion that this conflict exists, and support your argument by the citation of those clauses which refer to the militia. There are certain provisions not cited by you, which are not without influence on my judgment, and to which I call your attention. They will aid in defining what is meant by "militia," and in determining the respective powers of the States and the Confederacy over them.

The several States agree "not to keep *troops* or ships of war in time of peace." Art. 1, sec. 10, par. 3.

They further stipulate, that "a well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." Sec. 9, par. 13.

That "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger," &c. Sec. 9, par. 16.

What then are militia? They can only be created by law.—The arms-bearing inhabitants of a State are liable to become its militia, if the law so order; but in the absence of a law to that effect, the men of a State capable of bearing arms are no more militia than they are seamen.

The Constitution also tells us that militia are not *troops*, nor

are they any part of the *land or naval forces;* for militia exist in time of peace, and the Constitution forbids the States to keep troops in time of peace, and they are expressly distinguished and placed in a separate category from *land or naval forces*, in the 16th paragraph, above quoted; and the words *land or naval forces* are shown, by paragraphs 12, 13 and 14, to mean the army and navy of the Confederate States.

Now, if militia are not the citizens taken singly, but a body created by law; if they are not troops, if they are no part of the army and navy of the Confederacy—we are led directly to the definition quoted by the Attorney General, that, militia are a "*body* of soldiers in a State enrolled for discipline." In other words, the term "militia" is a collective term, meaning a *body* of men organized, and cannot be applied to the separate individuals who compose the organization.

The Constitution divides the whole military strength of the States into only two classes of organized bodies—one, the armies of the Confederacy; the other, the militia of the States.

In the delegation of power to the Confederacy, after exhausting the subject of declaring war, raising and supporting armies, and providing a navy, in relation to all which the grant of authority to Congress is *exclusive*, the Constitution proceeds to deal with the other organized body, the militia, and instead of delegating power to Congress alone, or reserving it to the States alone, the power is divided as follows, viz: Congress is to have power—

"To provide for calling forth the militia to execute the laws of the *Confederate* States, suppress insurrections, and *repel invasions*." Sec. 8. Par. 15.

"To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the Confederate States; *reserving to the States respectively the appointment of officers and the authority of training the militia* according to the discipline prescribed by Congress." Par. 16.

Congress, then, has the power to provide for *organizing* the arms-bearing people of the States into militia. Each *State* has the power to *officer* and *train* them when organized.

Congress may call forth the militia to execute *Confederate*

laws The *State* has not surrendered the power to call them forth to execute *State* laws.

Congress may call them forth to repel invasion; so may the State, for it has expressly reserved this right.

Congress may call them forth to suppress insurrection; and so may the *State*, for the power is impliedly reserved of governing all the militia except the part in actual service of the Confederacy.

I confess myself at a loss to perceive in what manner these careful and well defined provisions of the Constitution regulating the organization and government of the militia, can be understood as applying in the remotest degree to the armies of the Confederacy; nor can I conceive how the grant of *exclusive* power to declare and carry on war by armies raised and supported by the Confederacy, is to be restricted or diminished by the clauses which grant a *divided* power over the militia. On the contrary, the delegation of authority over the militia, so far as granted, appears to me to be plainly an *additional enumerated* power, intended to strengthen the hands of the Confederate Government in the discharge of its paramount duty, the common defence of the States.

You state, after quoting the 12th, 15th, and 16th grants of power to Congress, that, "These grants of power all relate to the same subject matter, and are all contained in the same section of the Constitution, and by a well known rule of construction, must be taken as a whole, and construed together."

This argument appears to me unsound.—*All* the powers of Congress are enumerated in one section; and the three paragraphs quoted can no more control each other by reason of their location in the same section, than they can control any of the other paragraphs preceding, intervening, or succeeding. So far as the subject matter is concerned, I have already endeavored to show that the armies mentioned in the 12th paragraph are a subject matter as distinct from the militia mentioned in the 15th and 16th, as they are from the navy mentioned in the 13th. Nothing can so mislead as to construe together and as a whole, the carefully separated clauses which define the different powers to be exercised over distinct subjects by the Congress. But, you add, that, "by the grant of power to Congress to raise and

support armies, without qualification, the framers of the Constitution intended the regular armies of the Confederacy, and not armies composed of the whole militia of all the States."

I must confess myself somewhat at a loss to understand this position. If I am right, that the militia is a *body* of enrolled State soldiers, it is not possible, in the nature of things, that armies raised by the Confederacy can "be composed of the whole militia of all the States." The militia may be called forth, in whole or in part, into the Confederate service, but do not thereby become part of the "armies raised" by Congress.—They remain militia, and go home when the emergency which provoked their call has ceased. Armies raised by Congress are of course raised out of the *same population* as the militia organized by the States; and to deny to Congress the power to draft a citizen into the army, or to receive his voluntary offer of services because he is a member of the State militia, is to deny the power to raise an army at all; for, practically, all men fit for service in the army may be embraced in the militia organizations of the several States. You seem, however, to suggest, rather than directly to assert, that the Conscript law may be unconstitutional, because it comprehends all arms-bearing men between 18 and 35 years: at least this is an inference which I draw from your expression, "armies composed of the *whole* militia of *all* the States." But it is obvious, that if Congress have power to draft into the armies raised by it any citizens at all (without regard to the fact whether they are or not members of militia organizations,) the power must be co-extensive with the exigencies of the occasion, or it becomes illusory; and the extent of the exigency must be determined by Congress; for the Constitution has left the power without any other check or restriction than the Executive veto. Under ordinary circumstances, the power thus delegated to Congress is scarcely felt by the States. At the present moment when our very existence is threatened, by armies vastly superior in numbers to ours, the necessity for defence has induced a call, not "for the whole militia of all the States," not for *any* militia, but for *men* to compose *armies* for the Confederate States.

Surely, there is no mystery on this subject. During our whole past history, as well as during our recent one year's experience

as a new Confederacy, the militia "have been called forth to repel invasion" in numerous instances; and they never came otherwise than as bodies organized by the States, with their company, field, and *general officers;* and when the emergency had passed, they went home again.

I cannot perceive how any one can interpret the Conscription Law as taking away from the States the power to appoint officers to their militia. You observe on this point in your letter, that unless your construction is adopted, "the very object of the States in reserving the power of appointing the officers, is defeated, and that portion of the Constitution is not only a nullity, but the whole military power of the States, and the entire control of the militia, with the appointment of the officers, is vested in the Confederate Government, whenever it chooses to call its own action 'raising an army,' and not calling forth the militia."

I can only say, in reply to this, that the power of Congress depends on the real nature of the act it proposes to perform, not on the name given to it; and I have endeavored to show that its action is merely that of "raising an army," and bears no semblance to "calling forth the militia." I think I may safely venture the assertion, that there is not one man out of a thousand of those who will do service under the Conscription Act that would describe himself, while in the Confederate service, as being a militia man; and if I am right in this assumption, the popular understanding concurs entirely with my own deductions from the Constitution as to the meaning of the word "militia."

My answer has grown to such a length that I must confine myself to one more quotation from your letter. You proceed: "Congress shall have power to *raise armies*. How shall it be done? The answer is clear. In conformity to the provisions of the Constitution, which expressly provides that when the militia of the States are called forth to *repel invasion*, and employed in the service of the Confederate States, which is now the case, the State shall appoint the officers."

I beg you to observe that the answer which you say is clear, is not an answer to the question put. The question is: How are armies to be raised? The answer given is, that when militia

are called forth to repel invasion, the State shall appoint the officers.

There seems to me to be a conclusive test on this whole subject. By our Constitution Congress may declare war, *offensive* as well as *defensive*. It may acquire territory.—Now, suppose that for good cause, and to right unprovoked injuries, Congress should declare war against Mexico, and invade Sonora. The militia could not be called forth in such a case, the right to call it being limited "to repel invasions." Is it not plain that the law now under discussion, if passed under such circumstances, could by no possibility be aught else than a law to "raise an army?" Can one and the same law be construed into a "calling forth the militia," if the war be defensive, and a "raising of armies," if the war be offensive?

At some future day, after our independence shall have been established, it is no improbable supposition that our present enemy may be tempted to abuse his naval power, by depredation on our commerce, and that we may be compelled to assert our rights by offensive war. How is it to be carried on? Of what is the army to be composed? If this Government cannot call on its arms-bearing population otherwise than as militia, and if the militia can only be called forth to repel invasion, we should be utterly helpless to vindicate our honor or protect our rights. War has been well styled "the terrible litigation of nations." Have we so formed our Government, that in this litigation we must never be plaintiff? Surely this cannot have been the intention of the framers of our compact.

In no aspect in which I can view this law, can I find just reason to distrust the propriety of my action in approving and signing it; and the question presented involves consequences, both immediate and remote, too momentous to permit me to leave your objections unanswered.

In conclusion, I take great pleasure in recognizing that the history of the past year affords the amplest justification for your assertion, that if the question had been, whether the Conscription Law was necessary in order to raise men in Georgia, the answer must have been in the negative. Your noble State has promptly responded to every call that it has been my duty to make on her; and to you, personally, as her Executive, I acknowledge

my indebtedness for the prompt, cordial, and effective co-operation you have afforded me in the effort to defend our common country against the common enemy.

I am, very respectfully,

Your obedient servant,

JEFFERSON DAVIS.

His Excellency Jos. E. Brown,
Governor of Georgia,
Milledgeville.

Atlanta, June 21st, 1862.

His Excellency Jefferson Davis, *President, &c.*

Dear Sir:—I have the honor to acknowledge the receipt of your letter of the 29th ult., in reply to mine of the 8th of the same month, which reached my office, at Milledgeville, on the 8th inst., together with a copy of the written opinion of the Attorney General, and has since been forwarded to me at Canton, where I was detained by family affliction.

Your reply, prepared after mature deliberation and consultation with a Cabinet of distinguished ability, who concur in your view of the constitutionality of the Conscription Act, doubtless presents the very strongest argument in defence of the Act, of which the case is susceptible.

Entertaining, as I do, the highest respect for your opinions and those of each individual member of your Cabinet, it is with great diffidence that I express the conviction, which I still entertain, after a careful perusal of your letter, that your argument fails to sustain the constitutionality of the Act; and that the conclusion at which you have arrived is maintained by neither the contemporaneous construction put upon the Constitution by those who made it, nor by the practice of the United States Government, under it, during the earlier and better days of the Republic, nor by the language of the instrument itself, taking the whole context, and applying to it the well established rules by which all constitutions and laws are to be construed.

Looking to the magnitude of the rights involved, and the disastrous consequences which, I fear, must follow what I consider

a bold and dangerous usurpation by Congress of the reserved rights of the States, and a rapid stride towards military despotism, I very much regret that I have not, in the preparation of this reply, the advice and assistance of a number equal to your Cabinet, of the many "eminent citizens" who, you admit, entertain with me, the opinion that the Conscription Act is a palpable violation of the Constitution of the Confederacy. Without this assistance, however, I must proceed individually to express to you some views, in addition to those contained in my former letters, and to reply to such points made by you in the argument, as seem to my mind to have the most plausibility in sustaining your conclusion.

The sovereignty and independence of each one of the thirteen States at the time of the adoption of the Constitution of the United States, will not, I presume, be denied by any, nor will it be denied that each of these States acted in its separate capacity, as an independent sovereign, in the adoption of the Constitution. The Constitution is, therefore, a league between sovereigns. In order to place upon it a just construction, we must apply to it the rules, which, by common consent, govern in the construction of all written constitutions and laws. One of the first of these rules is, to inquire what was the intention of those who made the constitution.

To enable us to learn this intention, it is important to inquire what they did, and what they said they meant, when they were making it. In other words, to inquire for the contemporaneous construction put upon the instrument by those who made it, and the explanations of its meaning by those who proposed each part in the Convention, which induced the Convention to adopt each part.

I incorporated into my last letter a number of quotations from the debates of prominent members of the Convention upon the very point in question, showing that it was not the intention of the Convention to give to Congress the unlimited control of all the men able to bear arms in the States, but that it was their intention to reserve to the States the control over those who composed their militia, by retaining to the States the appointment of the officers to command them, even while "employed in the service of the Confederate States." I might add many

other quotations containing strong proofs of this position, from the debates of the Federal Convention, and the action of the State Conventions which adopted the Constitution; but I deem it unnecessary, as you made no allusion to the contemporaneous construction in your reply, and I presume you do not insist that the explanations of its meaning given by those who made it sustain your conclusion.

I feel that I am fully justified by the debates and the action of the Federal and State Conventions, in saying that it was the intention of the thirteen sovereigns, to constitute a common agent with certain specific and limited powers, to be exercised for the good of all the principals, but that it was not the intention to give the agent the power to *destroy the principals.* The agent was expected to be rather the servant of several masters, than the master of several servants. I apprehend it was never imagined that the time would come when the agent of the sovereigns would claim the power, to take from each sovereign every man belonging to each, able to bear arms, and leave them with no power to execute their own laws, suppress insurrections in their midst, or repel invasions.

In reference to the practice of the United States Government under the Constitution, I need only remark, that I do not presume it will be contended that Congress claimed or exercised the right to compel persons constituting the militia of the States, by *conscription or compulsion*, to enter the service of the General Government, without the consent of their State Government, at any time while the Government was administered, or its councils controlled, by any of the fathers of the Republic who aided in the formation of the Constitution.

If, then, the constitutionality of the Conscription Act cannot be established by the contemporaneous construction of the Constitution, nor by the earlier practice of the Government while administered by those who made the Constitution, the remaining inquiry is, can it be established by the language of the instrument itself, taking the whole context, and applying to it the usual rules of construction, which were generally received and admitted to be authoritative at the time it was made.

The Constitution, in express language, gives Congress the power to "raise and support armies." You rest the case here,

and say you know of but two modes of "raising armies," to wit: "by voluntary enlistment, and by draft or conscription," and you conclude that the Constitution authorizes Congress to raise them by either or both these modes.

To enable us to arrive at an intelligent conclusion as to the meaning intended to be conveyed by those who used this language, it is necessary to inquire what signification was attached to the terms used, at the time they were used; and it is fair to infer that those who used them intended to convey to the minds of others the idea which was at that time usually conveyed by the language adopted by them. Apply this rule, and what did the Convention mean by the term "to raise armies?" I prefer that the Attorney General should answer. He says in his written opinion:

"Inasmuch as the words 'militia,' 'armies,' 'regular troops,' and 'volunteers,' had acquired a definite meaning in Great Britain before the Revolutionary war, and as we have derived most of our ideas on this subject from that source, we may safely conclude that the term 'militia,' in our Constitution, was used in the sense attached to it in that country."

Upon this statement of the Attorney General rests his definition of the term "militia," which is an English definition; and upon that definition rests all that part of your argument, which draws a distinction, however unsubstantial, between *calling forth* the militia by authority of Congress, and calling forth all men in the State who compose the militia by the same authority. In the one case, you term it *calling forth the militia*, and admit that the State has the right to appoint the officers: in the other case, while every man called forth may be the same, you term it *raising an army*, and deny to the State the appointment of the officers. As this is necessary to sustain the constitutionality of the Conscription Act, you cannot disapprove the statement of the Attorney General above quoted. If, then, the Attorney General is right, that the terms "militia," "armies," regular troops," and "volunteers" had acquired a definite meaning in Great Britain before the Revolutionary war, and we have derived most of our ideas on this subject from that source, and if we may safely conclude that the term "militia" in our Constitution was used in the sense attached to it in that country, is it not

equally safe to conclude that the terms "armies," and to "raise armies," having acquired a definite meaning in Great Britain before the Revolutionary war, were used in our Constitution in the same sense attached to them in that country?

At that period, the Government of Great Britain had no Conscription Act, and did not "raise armies" by conscription, therefore the Convention which made our Constitution, "having derived most of their ideas on this subject from that source," it is "safe to conclude" that they used the term to "raise armies in the sense attached to it in that country." It necessarily follows, the Attorney General being the judge, that your conclution is erroneous, and that Congress has no power to "raise armies," not even her "regular armies," *by conscription.*

But, as those who framed the Constitution foresaw that Congress might not be able by voluntary enlistment, to raise regular or standing armies sufficiently large to meet all emergencies, or that the people might refuse to vote supplies to maintain in the field armies so large and dangerous, they wisely provided, in connection with this grant of power, another relating to the same subject-matter, and gave Congress the additional power to call forth the militia to execute the laws of the Confederate States, suppress insurrections, and repel invasions.

In this connection, I am reminded by your letter, that Congress has power "to declare war," which you say embraces the right to declare offensive as well as defensive war; and you argue, as I understand, that the militia can only be called forth to repel invasions, and not to invade a foreign power, and that Congress would be powerless to redress our wrongs, or vindicate our honor, if it could not "raise armies" by conscription, to invade foreign powers. If this were even so, it might be an objection to the Constitutional Government, for want of sufficient strength, which is an objection often made by those who favor more absolute power in the General Government, and who attempt, by a latitudinarian construction of the Constitution, to supply powers which were never intended to be given to it. But does the practical difficulty which you suggest, in fact exist? I maintain that it does not. And I may here remark, that those who established the Government of our fathers, did not look to it, as a great military power, whose

people were to live by plundering other nations in foreign aggressive war, but as a peaceful Government, advised by the Father of his Country, to avoid "entangling alliances" with foreign powers.

But you suppose, after our independence is established, that our present enemy may be tempted to abuse his naval power, by depredation on our commerce, and that we may be compelled to assert our rights by offensive war, and you ask, "How is it to be carried on?" "Of what is the army to be composed?" The answer is a very simple one. If the aggression is such as to justify us in the declaration of offensive war, our people will have the intelligence to know it, and the patriotism and valor to prompt them to respond by voluntary enlistment, and to offer themselves under officers of their own choice, through their State authorities, to the Confederacy, just as they did in the offensive war against Mexico, when many more were offered than were needed, without conscription or coercion; and just as they have done in our present defensive war, when almost every State has responded to every call, by sending larger numbers than were called for, and larger than the Government can arm and make effective. There is no danger that the honor of the intelligent freeborn citizens of this Confederacy will ever suffer because the Government has not the power to *compel* them to vindicate it. They will hold the Government responsible if it refuses to *permit* them to do it. To doubt this, would seem to be, to doubt the intelligence and patriotism of the people, and their competency for self-government.

It would be very dangerous, indeed to give the General Government the power to engage in an offensive foreign war the justice of which was condemned by the Governments of the States, and the intelligence of the people, and to compel them to prosecute it for two years, the term for which appropriations can be made and continued by the Congress declaring it. Hence the wisdom of our ancestors in limiting the power of Congress over the militia, or great body of our people, so as to prohibit the prosecution, by *conscription or coercion*, of an offensive foreign war, which may be condemned by an intelligent public opinion.

France has a conscription act, which Great Britain has not.

Both are warlike powers, often engaged in foreign offensive wars. What advantage has the conscription law given to France over Great Britain? Has not the latter been as able as the former to "raise armies" sufficient to vindicate her honor and maintain her rights? When France had no conscription law at one period of her history, she was a Republic. Soon after she had a conscription law, she became an Empire, and her ruler an Emperor, leaving her people without the constitutional safeguards which protect the people of Great Britain.

But you ask, "Shall we never be plaintiff in this terrible litigation of nations?'" If the litigation commends itself to the intelligence of the people as just, they will not hesitate to put themselves at the command of the Government to assume the plaintiff's position. The eagerness with which the people of the Confederacy now desire that we assume the plaintiff's position, and become the attacking and invading party, instead of acting constantly upon the defensive, is evidence to sustain my conclusion on this point.

That those who framed the Constitution looked to a state of war as tending to concentrate the power in the Executive, and as unfavorable to constitutional liberty, and did not intend to encourage it, unless in cases of absolute necessity, and did not, therefore, form the Government with a view to its becoming a power often engaged in offensive war, may be inferred from the language of Mr. Madison. He says:

"War, is, in fact, the true nurse of Executive aggrandizement. In war a physical force is to be created, and it is the Executive will which is to direct it. In war the public treasures are to be unlocked, and it is the Executive hand which is to dispense them. In war, the honors and emoluments of office are to be multiplied, and it is the Executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered, and it is the Executive brow they are to encircle. The strongest passions and most dangerous weaknesses of the human breast—ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace." See Federalist, page 452.

In connection with this remark of Mr. Madison, it may not be amiss to add one from Mr. Calhoun. That great and good

man who may justly be styled the champion of *State Rights and Constitutional Liberty*, in the first volume of his works, page 361, while speaking of the war which was forced upon Mr. Madison while President, by Great Britain, says:

"It did more; for the war, however just and necessary, gave a strong impulse adverse to the Federal and favorable to the national line of policy. This is, indeed, one of the unavoidable consequences of war, and can be counteracted only by bringing into full action the *negatives* necessary to the protection of the *reserved powers*. These would, of themselves, have the effect of preventing wars, so long as they could be honorably and safely avoided; and when necessary, of arresting, to a great extent, *the tendency of the Government to transcend the limits of the Constitution during its prosecution*, and of correcting all departures after its termination. It was by force of the tribunitial power that the plebeians retained for so long a period their liberty in the midst of so many wars."

I beg to call special attention to the portions of the above quotation which I have *italicised*.

Having rested the constitutionality of the Conscription Act upon the power given to Congress to "raise armies," you enunciate a doctrine which I must be pardoned for saying, struck me with surprise; not that the doctrine was new, for it was first proclaimed, I believe, almost as strongly, by Mr. Hamilton in the Federalist, but because it found an advocate in you, whom I had for many years regarded as one of the ablest and boldest defenders of the doctrines of the State Rights school, in the old government. Your language is:

"I hold that when a specific power is granted by the Constitution, like that now in question, to 'raise armies,' Congress is the judge whether the law passed for the purpose of executing that power, is necessary and proper."

Again you say:

"The true and only test is, to enquire whether the law is intended and calculated to carry out the object, whether it devises and creates an instrumentality for executing the specific power granted, and if the answer be in the affirmative the law is constitutional."

From this you argue that the Conscription Act is calculated and intended to "raise armies," and, therefore, constitutional.

I am not aware that the proposition was ever stated more broadly in favor of unrestrained Congressional power, by Webster, Story, or any other statesman or jurist of the Federal school.

This is certainly not the doctrine of the republican party of 1798, as set forth in the Virginia and Kentucky Resolutions. The Virginia Resolutions use the following language, that, "It (the General Assembly of Virginia,) views the powers of the Federal Government as resulting from the compact to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact, as no further valid than they are authorized by the grants enumerated in that compact; and that in the case of a *deliberate, palpable* and *dangerous exercise* of *other powers* not granted by said compact, *the States* who are parties thereto, *have the right* and are *in duty bound to interpose for arresting the progress of the evil*, and for *maintaining* within their respective limits the *authorities, rights* and *liberties appertaining to them.* That the General Assembly doth also express its deep regret, that a spirit has in sundry instances been manifested by the Federal Government, *to enlarge its powers by a forced construction of the Constitutional charter which defines them;* and that indications have appeared of a design to expound *certain general phrases*—(which having been copied from the very limited grant of powers in theformer articles of Confederation were the less liable to be misconstrued)—so as to destroy the meaning and effect of the particular enumeration, which *necessarily explains and limits the general phrases, so as to consolidate the States by degrees into one sovereignty*, the obvious tendency and inevitable result of which would be to transform the present Republican system of the United States, *into an absolute or at least a mixed monarchy.*"

The following quotations are from the Kentucky Resolutions drawn up by Mr. Jefferson himself, (the italics, as in the last quotation, are my own.) "That the several States composing the United States of America are not united on the principle of *unlimited submission* to the General Government; but that, by

a compact under the style and title of a Constitution of the United States, and of amendments thereto, they constituted a General Government for special purposes—delegated to that Government certain definite powers; *reserving, each State to itself, the residuary mass of right to their own self-government;* that whensoever the General Government *assumes undelegated powers its acts are unauthoritative, void and of no force;* that to this compact each State acceded as a State, and is an integral party—its co-States forming as to itself the other party; *that the Government created by this compact was not made the exclusive or final* JUDGE *of the extent of the powers delegated to it—since that would have made* ITS DISCRETION and not the Constitution the *measure of its powers;* but that as in all other cases of compact among parties having *no common* JUDGE, each has an equal right to JUDGE *for itself as well of infractions as of the mode and measure of redress.*"

And again:

"*That the construction applied by the General Government* (as evinced by sundry of their proceedings) to those parts of the Constitution of the United States which delegate to Congress a power to lay and collect taxes, duties, imposts and excises; to pay the debts and *provide for the common defence* and general welfare of the United States; and to make all laws necessary and proper for carrying into execution the powers vested by the Constitution in the Government of the United States, or any department thereof, *goes to the destruction of all the limits prescribed to their power by the Constitution.* That words meant by that instrument to be *subsidiary only to the execution of the limited powers ought not to be so construed, as themselves to give unlimited powers, nor a part so to be taken as to destroy the whole residue of the instrument.*"

But let us examine your doctrine a little further and see whether it can be reconciled to the construction lately put upon the Constitution by the States composing the Confederacy, over which you preside, and the action lately taken by them.

The Constitution of the United States gives Congress the power to provide for calling forth the militia to "suppress insurrections." Carry out your doctrine, and Congress must of course be *the Judge* of what constitutes an insurrection, as well

as of the means "*necessary and proper*" to be used in executing the specific power given to Congress to suppress it. Georgia, claiming that the Congress of the United States had abused the specific powers granted to it, and passed laws which were not "*necessary and proper*" in executing these specific powers, which were injurious to her people, and claiming to be herself the *Judge*, seceded from the Union. Congress denied her power or right to do so, and acting upon the doctrine laid down by you, Congress claiming to be *the Judge*, proceeded to adjudicate the case, and determined that the action of Georgia amounted to an insurrection, and passed laws for its suppression. Among others, they have passed a law, if we may credit the newspapers, which authorizes the President to arm our negroes against us. Congress will, no doubt, justify this act, under the specific power given to it by the Constitution, to "raise armies," as the armies, as well as the militia may be used to suppress insurrection, and to execute the laws. Apply the test laid down by you, and inquire, is this law "calculated and intended" to carry out the object (the suppression of the insurrection, and the execution of the laws of the United States in Georgia)? and does it "devise and create an instrumentality for executing the specific power granted?" Congress, *the Judge*, answers the question in the affirmative. Therefore the law is constitutional.

Again, suppose you are right, and Congress has the constitutional power to "raise armies" by Conscription, and without the consent of the States, to compel every man in the Confederacy, between 18 and 35 years old, able to bear arms, to enter these armies, you must admit that Congress has the same power to extend the law, and compel every man between 16 and 60 to enter. And, you must admit that the grant of power is as broad in times of peace as in times of war, as there is in the grant no language to limit it to times of war. It follows that Congress has the absolute control of every man in the State, whenever it chooses to execute to the full extent the power given it by the Constitution to "raise armies." How easy a matter it would have been, therefore, had the Congress of the United States understood the full extent of its power to have prevented in a manner perfectly constitutional, the secession of Georgia

and Mississippi from the Union. It was only necessary to pass a *Conscription Law* declaring every man in both States, able to bear arms, to be in the military service of the United States, and that each should be treated as a deserter if he refused to serve; and that Congress, *the Judge*, then decide that this law was "necessary and proper," and that it created an instrumentality for the execution of one of the specific powers granted to Congress to provide for the execution of the laws of the Union in the two States, or to provide for "raising armies." This would have left the States without a single man at their command, without the power to organize or use military force, and without free men to constitute even a Convention to pass an ordinance of secession.

If it is said, the people of the States would have refused to obey this law of Congress, and would have gone out in defiance of it; it may be replied that this would have been revolution and not peaceful secession, the right for which we have all contended—though our enemies have not permitted us to part with them in peace—the right for which we are now fighting.

Your doctrine carried out not only makes Congress supreme over the States, at any time when it chooses to exercise the full measure of its power to "raise armies," but it places the very existence of the State Governments subject to the will of Congress. The Conscription Act makes no exception in favor of the officers necessary to the existence of the State Government, but in substance declares that they shall all enter the service of the Confederacy, at the call of the President, under officers which are in future to be appointed by the President.

As already remarked, Congress has as much power to extend the act to embrace all between 16 and 60, as it had to take all between 18 and 35. If the act is constitutional, it follows that Congress has the power to compel the Governor of every State in the Confederacy, every member of every Legislature of every State, every Judge of every Court in every State, every officer of the militia of every State, and all other State officers to enter the military service as privates in the armies of the Confederacy, under officers appointed by the President, at any time when it so decides. In other words, Congress may disband the State Governments any day when it, as *the judge*, decides that

by so doing it "creates an instrumentality for executing the specific power" to "raise armies."

If Congress has the right to discriminate, and take only those between 18 and 35, it has the right to make any other discrimination it may judge "necessary and proper" in the "execution of the power," and it may pass a law in time of peace or war, if it should conclude the State Governments are an evil, that all State officers, Executive, Legislative, Judicial, and Military, shall enter the armies of the Confederacy as privates under officers appointed by the President, and that the army shall from time to time be recruited from other State officers as they may be appointed by the States.

To state the case in different form, Congress has the power under the 12th paragraph of the 8th section of the 1st Article of the Constitution to disband the State Governments, and leave the people of the States with no other Government than such military despotism, as Congress in the exercise of the specific power to "raise armies" (which I understand you to hold is a distinct power to be construed separately) may, after an application of your test, *judge* to be best for the people.

For, as all the State officers which I mention might make effective privates in the armies of the Confederacy, and as the law passed to compel them to enter the service might "create an instrumentality for executing the specific power to "raise armies," Congress, *the judge*, need only so decide and the act would be constitutional.

I may be reminded, however, that Congress passed an *Exemption* Act after the passage of the Conscription Act, which exempts the Governors of the States, the members of the State Legislatures, the Judges of the State Courts, &c., from the obligation to enter the military service of the Confederacy as privates under Confederate officers. It must be borne in mind, however, that this very act of exemption by Congress is an assertion of the right vested in Congress to compel them to go, when Congress shall so direct, as Congress has the same power to repeal which it had to pass the Exemption Act. All the State officers, therefore, are exempt from Conscription by the *grace and special favor of Congress* and not by *right* as the Governments of the independent States whose agent, and not mas-

ter, Congress had been erroneously supposed to be. If this doctrine be correct, of what value are *State rights* and *State sovereignty?*

In my former letter I insisted, under the general rule, that the 12th, 15th and 16th paragraphs of the section under consideration, all relating to the same *subject matter*, should be construed together. While your language on this point is not so clear as in other parts of your letter, I understand you to take issue with me here. You say:

"Nothing can so mislead as to construe together and as one whole, the carefully separated clauses, which define the different powers to be exercised over distinct subjects by Congress."

These are not carefully separated clauses which relate to different powers, to be exercised over *distinct subjects*. They all relate to the *same subject matter*, the authority given to Congress over the question of war and peace. They all relate to the use of armed force by authority of Congress. If, therefore, Coke, Blackstone and Mansfield of England, and Marshall, Kent and Story of this country, with all other intelligent writers on the rules of construction, are to be respected as authority, there can, it would seem, be no doubt of the correctness of the position that these three paragraphs, together with all others in the Constitution which relate to the same subject matter, are to be construed together "as one whole."

Construe them together, and the general language in one paragraph, is so qualified by another paragraph, upon the *same subject matter*, that all can stand together, and the whole when taken together, establishes to my mind the unsoundness of your argument and the fallacy of your conclusion.

But I must not omit to notice your definition of the term "militia," and the deductions which you draw from it.

You adopt the definition of the Attorney General, that "the militia are a body of soldiers in a State enrolled for discipline." Admit, for the purposes of the argument, the correctness of the definition. All persons, therefore, who are enrolled for discipline under the laws of Georgia constitute her militia. When the persons thus enrolled (the militia) are employed in the service of the Confederate States, the Constitution expressly reserves to Georgia the appointment of the officers. The Con-

scription Act gives the President the power by compulsion to employ every one of those persons, between 18 and 35, in the service of the Confederate States; and denies to the State the appointment of a single officer to command them, while thus "employed." Suppose Congress at its next session should extend the act so as to embrace all between 18 and 45, what is the result? "The body of soldiers in the State enrolled for discipline" are every man "employed in the service of the Confederacy," and the right is denied to the State to appoint a single officer, when the Constitution says she shall appoint them all. Is it fair to conclude, when the States expressly and carefully reserved the control of their own militia, by reserving the appointment of the officers to command them, that they intended under the general grant of power to "raise armies," to authorize Congress to defeat the reservation and control the militia, with their officers, by calling the very same men into the field, *individually* and not *collectively*, organizing them according to its own will, and terming its action "raising an army" and not *calling forth the militia?* Surely the great men of the revolution when they denied to the General Government the appointment even of the *General Officers*, to command the militia when employed in the service of the Confederacy, did not imagine that the time would come so soon when that Government, under the power to "raise armies," would claim and exercise the authority to call into the field the whole militia of the States, individually, and deny to the States the appointment of the lowest lieutenant, and justify the act on the ground that Congress did not choose to call them into service in their collective capacity, and deny that they were militia if called into service in any other way.

If Congress has the power to call forth the whole enrolled force or militia of the States in the manner provided by the Conscription Act, there is certainly no *obligation* upon Congress ever to *call them forth* in any other manner, and it rests in the *discretion* of Congress whether or not the States shall ever be permitted to exercise their reserved right; as Congress has the power in every case to defeat the exercise of the right by calling forth the militia under a conscription act, and not by requisitions made upon the States. It cannot be just to charge the

States with the folly of making this important reservation, subject to any such power in Congress to render it nugatory at its pleasure.

Again, you say "Congress may call forth the militia to execute *Confederate* laws; the *State* has not surrendered the power to call them forth to execute *State* laws."

"*Congress* may call them forth to repel invasion; so may the *State*, for it has expressly reserved this right."

"*Congress* may call them forth to suppress insurrection and so may the *State*."

If the conscription law is to control, and Congress may, without the consent of the State Government, order every man composing the militia of the State, out of the State, into the Confederate service, how is the State to call forth her own militia, as you admit she has reserved the right to do, to execute her own laws, suppress an insurrection in her midst, or repel an invasion of her own territory?

Could it have been the intention of the States to delegate to Congress the power to take from them without their consent the means of self preservation, by depriving them of all the strength upon which their very existence depends?

After laying down the position that the citizens of a State are not her militia, and affirming that the militia are "a body organized by law," you deny that the militia constitute any part of the *land or naval forces*, and say they are distinguished from the *land and naval forces*, and you further say they have always been *called forth* as "bodies organized by the States," with their officers; that they "do not become part of the *armies raised* by Congress," but remain militia, and that when they had been called forth, and the exigencies which provoked the call had passed, "they went home again." The militia when *called forth* are taken from the body of the people, to meet an emergency, or to repel invasion. If they go in as "bodies organized by the States," you hold that they go in *militia*, remain *militia*, and when the exigency is passed they go home *militia*, but if you *call forth* the same men by the Conscription Act for the same purpose, and they remain for the same length of time, and do the same service, they are not *militia* but the *armies* of the Confederacy, part of the *land or naval force*. In connec-

tion with this part of the subject you use the following language:

"At the present moment when our very existence is threatened by armies vastly superior in numbers to ours, the necessity for defence has induced a call, not for the whole militia of all the States, not for *any* militia, but for *men* to compose *armies* for the Confederate States."

In the midst of such pressing danger, why was it that there was no necessity for *any* militia; in other words, no necessity for any "bodies of men organized by the States," as were many of the most gallant regiments now in the Confederate service, who have won on the battle-field a name in history, and laurels that can never fade?

Were no more such bodies "organized by the States" needed, because the material remaining within the States of which they must be composed was not reliable? The Conscription Act gives you the very same material. Was it because the officers appointed by the States to command the gallant State regiments and other "organized bodies" sent by the States were less brave or less skillful than the officers appointed by the President to command similar "organized bodies?" The officers appointed by the States who now command regiments in the service, will not fear to have impartial history answer this question. Was it because you wished select men for the *armies* of the Confederacy? The Conscription Act embraces *all*, without distinction, between 18 and 35 able to do military duty and not legally exempt. You do not take the militia. What do you take? You take every man between certain ages, of whom the militia is composed. What is the difference between taking the militia and taking all the men who compose the militia? Simply this: In the one case you take them *with their officers appointed by the States*, as the Constitution requires, and call them by their proper name, "militia," "employed in the service of the Confederate States." In the other case you take them all as individuals—get rid of the State officers—appoint officers of your own choice, and call them the "armies of the Confederacy." And yet these armies, like you say the militia do, will "go home" when the exigency has passed, as it is hoped they are not expected to be permanent like the *regular armies*

of the Confederacy; or, in other words, like the *land and naval forces* provided for in the Constitution, from which you distinguish the militia. Indeed, the similarity between these "armies of the Confederacy," *called forth* in an emergency, to repel an invasion, to be disbanded when the emergency is passed; and the militia or bodies of troops organized and officered by the States, *called forth* for the same purpose, to be composed of the same material and disbanded at the same time, is most remarkable in everything, except the name and the appointment of the officers.

Excuse me for calling your attention to another point in this connection.

As you admit that the militia have always been *called forth* as "bodies organized by the States," and when thus called forth that the States have always appointed the officers, I presume you will not deny that when the President, by authority of Congress has made a call upon a State for "organized bodies of soldiers," and they have been furnished by the State from the body of her people, they have entered the service as part of the militia of the State "employed in the service of the Confederate States" under the 15th and 16th paragraphs of the 8th Section of the 1st Article of the Constitution.

Your message to Congress recommending its passage shows that there was no necessity for the act, to enable you to get troops, as you admit that the Executives of the States had enabled you to keep in the field *adequate forces*, and also that the spirit of resistance among the people was such that it needed to be regulated and not stimulated. You say:

"I am happy to assure you of the entire harmony of purpose and cordiality of feeling which have continued to exist between myself and the Executives of the several States, and it is to this cause that our success in keeping adequate forces in the field is to be attributed." Again you say:

"The vast preparations made by the enemy for a combined assault at numerous points on our frontier and sea coast, have produced the result that might have been expected. They have animated the people with a spirit of resistance so general, so resolute and so self-sacrificing, that it requires rather to be regulated than to be stimulated."

If then the Executives of the States by their cordial co-operation had enabled you to keep in the field "adequate forces," and the spirit of resistance was as high as you state, there was no need of a Conscription Act to enable you to "raise armies."

Since the invasion of the Confederacy by our present enemy, you have made frequent calls upon me as Governor of this State for "organized bodies" of troops. I have responded to every call and sent them as required, "organized" according to the laws of the State, and commanded by officers appointed by the State, and in most instances, fully armed, accoutred and equipped. These bodies were *called forth* to meet an emergency, and assist in repelling an invasion. The emergency is not yet passed, the invasion is not yet repelled, and they have not yet returned home. If your position be correct they constitute no part of the *land or naval forces* as they were not *organized* nor their officers appointed by the President, as is the case with the *armies* of the Confederacy, but they were *called forth* as bodies "organized and their officers appointed by the States." Hence they are part of the militia of Georgia employed in the service of the Confederate States as provided by the two paragraphs of the Constitution above quoted, and by paragraph 16 of Section 9 of the 1st Article which terms them "militia in actual service in time of war or public danger." They entered the service with only the training common to the citizens of the State. They are now well trained troops. But having gone in as "bodies organized by the State," or as *militia*, you say they remain militia, and go home militia. In this case we seem to agree that the State, under the express reservation in the Constitution, has the right to appoint the officers. I have the written opinion of Mr. Benjamin, then Secretary of War, about the time of the last call for twelve regiments, concurring in this view, and recognizing this right of the State. And it is proper that I should remark that the State has, in each case, been permitted to exercise this right, when the troops entered the service in compliance with a requisition upon the State for "organized bodies of troops." The right does not stop here, however. The Constitution does not say the State shall appoint the officers while the organizations may be forming to enter the service of the Confederacy, but while they "may be *employed* in

the service of the Confederate States." Many thousands are now *so employed.* Vacancies in the different offices are frequently occurring by death, resignation, &c. The laws of this State provide how these vacancies are to be filled and it is *not* to be done by promotion of the officer next in rank, except in a single instance, but by election of the regiment, and commission by the Governor. The right of the State to appoint these officers seems to be admitted, and is, indeed, too clear to be questioned.

The Conscription Act, if it is to be construed according to its language, and the practice which your Generals are establishing under it, denies to the State the exercise of this right, and prescribes a rule for selecting all officers in future, unknown to the laws of Georgia, and confers upon the President the power to commission them. Can this usurpation (I think no milder term expresses it faithfully) be justified under the clause in the Constitution which gives Congress power to "raise armies?" and is this part of the Act constitutional? If not, you have failed to establish the constitutionality of the Conscription Act.

The 14th paragraph of the 9th Section of the 1st Article of the Constitution of the Confederate States declares that—

"A *well regulated militia* being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." This was no part of the original Constitution as reported by the Convention and adopted by the States. But "The Convention of a number of the States having at the time of their adopting the Constitution expressed a desire in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added, Congress at the session begun and held at the city of New York on Wednesday the 4th of March, 1789, proposed to the Legislatures of the several States twelve amendments, ten of which only were adopted."

The second amendment was the one above quoted, which shows very clearly that the States were jealous of the control which Congress might claim over their militia, and required on this point a further "restrictive clause" than was contained in the original Constitution.

The 16th paragraph of the preceding Section expressly re-

serves to the States "the authority of *training* the militia according to the discipline prescribed by Congress." In connection with this, you admit that the States reserved the right to call forth their own militia to execute their own laws, suppress insurrections or repel invasions. This authority to *call them forth* would have been of no value without the authority to *appoint officers to command them;* and the further authority to *train* them; as they cannot without *officers* and *training* be the *well regulated militia* which the Constitution says is "necessary to the security of a free State."

The conclusion would seem naturally to follow, that the States did not intend by any general words used in the grant of power, to give Congress the right to take from them, as often as appointed, the officers selected by them to *train* and *regulate* their militia and prepare them for efficiency, when they may be called forth to support the very existence of the State.

The Conscription Act embraces so large a proportion of the militia officers of this State, as to disband the militia in the event they should be compelled to leave their commands. This would leave me without the power to reorganize them, as a vacancy can only be created in one of these offices by resignation of the incumbent, or by the voluntary performance of some act which amounts to an abandonment of his command, or by a sentence of a Court Martial dismissing him from office. The officer who is dragged from his command by Conscription, or compulsion, and placed in the ranks, is in neither category; and his office is no more vacated than the office of a judge would be, if he were ordered into military service without his consent. And unless there be a vacancy I have no right to fill the place, either by ordering an election, or by a brevet appointment. I have no right in either case to commission a successor so long as there is a legal incumbent.

Viewing the Conscription Act in this particular as not only unconstitutional, but as striking a blow at the very existence of the State, by disbanding the portion of her militia left within her limits, when much the larger part of her "arms-bearing people" are absent in other States in the military service of the Confederacy, leaving their families and other helpless women and children, subject to massacre by negro insurrection for want of

an organized force to suppress it, I felt it an imperative duty which I owed the people of this State, to inform you in a former letter that I could not permit the disorganization to take place, nor the State officers to be compelled to leave their respective commands and enter the Confederate service as Conscripts.—Were it not a fact well known to the country that you now have in service tens of thousands of men without arms and with no immediate prospect of getting arms, who must remain for months consumers of our scanty supplies of provisions, without ability to render service, while their labor would be most valuable in their farms and workshops, there might be the semblance of a plea of necessity for forcing the *State officers* to leave their commands, with the homes of their people unprotected, and go into camps of instruction, under Confederate officers, often much more ignorant than themselves of military science or training. I must, therefore, adhere to my position and maintain the integrity of the State Government in its Executive, Legislative, Judicial and Military Departments, as long as I can command sufficient force to prevent it from being disbanded, and its people reduced to a state of provincial dependence upon the Central power.

If I have used strong language in any part of this letter, I beg you to attribute it only to my zeal in the advocacy of principles and a cause which I consider no less than the cause of constitutional liberty, imperiled by the erroneous views and practice of those placed upon the watch-tower as its constant guardians.

In conclusion, I beg to assure you that I fully appreciate your expressions of personal kindness, and reciprocate them in my feelings towards you to the fullest extent.

I know the vast responsibilities resting upon you, and would never willingly add unnecessarily to their weight, or in any way embarrass you in the discharge of your important duties.—While I cannot agree with you in opinion upon the grave question under discussion, I beg you to command me at all times when I can do you a personal service, or when I can, without a violation of the constitutional obligations resting upon me, do any service to the great cause in which we are all so vitally interested.

Hoping that a kind Providence may give you wisdom so to conduct the affairs of our young Confederacy as may result in the early achievement of our Independence, and redound to the ultimate prosperity and happiness of our whole people,

I have the honor to be, very respectfully,

Your obedient servant,

JOSEPH E. BROWN.

P. S.—Since the above letter was written I see, somewhat to my surprise, that you have thought proper to publish *part* of our unfinished correspondence.

In reply to my first letter you simply stated on the point in question that the constitutionality of the Act was derivable from that paragraph in the Constitution which gives Congress the power to raise and suppport armies. I replied to that letter with no portion of your argument but the simple statement of your position before me. You then with the aid of your Cabinet replied to my second letter, giving the argument by which you attempt to sustain your position, and without allowing time for your letter to reach me, and a reply to be sent, you publish my second letter and your reply which is your first argument of the question. I find these two letters not only in the newspapers but also in pamphlet form, I presume by your order for general circulation.

While I cannot suppose that your sense of duty and propriety would permit you to publish part of an unfinished correspondence for the purpose of forestalling public opinion, I must conclude that your course is not the usual one in such cases. As the correspondence was an official one upon a grave constitutional question, I had supposed it would be given to the country through Congress and the Legislature of the State.

But as you have commenced the publication in this hasty and as I think informal manner, you will admit that I have no other alternative but to continue it. I must, therefore, request as an act of justice that all newspapers which have published part of the correspondence, insert this reply. J. E. B.

EXECUTIVE DEPARTMENT,
RICHMOND, July 10th, 1862.

Dear Sir: I have received your letter of 21st ult., and would have contented myself with the simple acknowledgment of its receipt but for one or two matters contained in it, which seem to require distinct reply.

I deemed it my duty to state my views in relation to the constitutionality of the conscript law for the reasons mentioned in my letter to you, but it was no part of my intention to enter into a protracted discussion. It was convenient to send my views to others than yourself, and for this purpose I caused my letter together with yours to be printed in pamplet form. I am not aware of having omitted any part of your observations, nor did I anticipate any further correspondence on the subject. I supposed you had fully stated your views as I had stated mine, and no practical benefit could be attained by further discussion.

It is due however to myself to disclaim in the most pointed manner a doctrine which you have been pleased to attribute to me, and against which you indulge in lengthened argument. Neither in my letter to you nor in any sentiment ever expressed by me, can there be found just cause to impute to me the belief that Congress is the final judge of the constitutionality of a contested power.

I said in my letter that "when a *specific* power is granted, Congress is the judge whether the law passed for the purpose of executing that power, is necessary and proper."

I never asserted nor intended to assert, that after the passage of such law it might not be declared unconstitutional by the Courts on complaint made by an individual; nor that the judgment of Congress was conclusive against a State, as supposed by you; nor, that all the co-ordinate branches of the general government could together finally decide a question of the reserved rights of a State. The right of each State to judge in the last resort whether its reserved powers had been usurped by the general government, is too familiar and well settled a principle to admit of discussion.

As I cannot see however, after the most respectful consideration of all that you have said, anything to change my

conviction that Congress has exercised only a plainly granted specific power in raising its armies by conscription, I cannot share the alarm and concern about State rights which you so evidently feel, but which to me seem quite unfounded. I am very respectfully

Yours,
JEFFERSON DAVIS.

Gov. JOSEPH E. BROWN,
Atlanta, Ga.

ATLANTA, July 22d, 1862.

His Excellency Jefferson Davis,

DEAR SIR:—I have the honor to acknowledge the receipt of your letter of the 10th inst., and am very happy to know that you disclaim the doctrine, which I think every fair minded man has attributed to you who has read your letter of the 29th May last, and has construed plain English words according to their established meaning.

When a writer speaks of a tribunal that is to be "the judge" of a case, without qualification, we certainly understand him to mean, that this judge has the right to *decide* the case. And if the judge has this right, the decision must be binding upon all the parties, and no distinct and separate tribunal, as a different department of the Government, for instance, has the right to decide the same case, after it has been decided by the judge having competent jurisdiction. It would seem to be a contradiction in terms to say, that when a specific power is granted, Congress is the judge "whether the law passed for the purpose of executing that power, is necessary and proper," and that, "the true and only test is to enquire, whether the law is intended and calculated to carry out the object, whether it devises and creates an instrumentality for executing the specific power granted; and if the answer be in the affirmative, the law is constitutional," and then to say, after this test has been applied, and Congress has passed judgment, that another department of the Government, as the President, or the Judiciary, or another Government, as a State, may take up the case, thus decided by the tribunal, having, under the Constitution, complete jurisdiction, and make a differ-

ent decision. It is, I believe an established principle in all civilized nations, that when a Court of competent jurisdiction,—unless guilty of fraud or mistake,—has finally decided a case, the judgment is conclusive upon all the parties.

But you say, you never asserted nor intended to assert, that the judgment of Congress was conclusive against a State. Pardon me for saying that you did assert that Congress *is the judge*, and that you did not qualify the assertion, by saying, the judge in the first instance, nor did you annex any other qualification or exception in favor of the rights of a State, or any other party. I had no right therefore to suppose that you intended to engraft exceptions upon a rule which you laid down in the plainest terms without exception.

I make the above reference to your former letter, to show that I had no disposition to do you injustice, and that I do not consider that I misrepresented your position, as contained in your letter. The thousands of intelligent citizens, in different parts of the Confederacy, who have placed upon your letter the same construction which I had, will doubtless be gratified that you now disclaim the dangerous doctrine as to the power of Congress to which your strong unqualified language seemed clearly to commit you.

In reference to the publication by you of the two letters containing part of our correspondence, I need only say, that you had devoted a large portion of your letter to a reply to my argument which was before you, and had in the same letter, for the first time, given the arguments by which you maintain your own position. These I had never seen, and as you had replied at length to my argument, it was, I think, but fair and just, according to all rules of discussion, that I have an opportunity to reply to yours, and that the whole case be submitted to the country together. Unless there were important reasons of State which in your judgment made it necessary to place the discussion before the country, incomplete in order to satisfy the discontents which existed in the public mind, on account of what a very large proportion of our people regard as a dangerous usurpation, or unless other good reasons existed for a departure from the usual rule in such cases, I am unable to see why the whole correspondence, when given to the public, should not have gone through the usual official channels.

I have certainly had no wish to protract the discussion of this question, further than duty, and justice to the people of this State required. I feel that I cannot close, however, without again earnestly inviting your attention to a question which you must admit is "practical."

I think I have established beyond a doubt, in my former letters, the constitutional right of the State of Georgia, to appoint the officers to command the regiments and battalions, which she has sent into the service of the Confederate States, in compliance with requisitions made by you upon her Executive for "organized bodies" of troops. You admitted in your letter, that these bodies "organized by the States," when called forth by the Confederacy to repel invasion, never came otherwise than with their *Company*, *Field* and *General officers*. Your former Secretary of War, now Secretary of State, has also admitted the right of the State to appoint the officers to command the troops sent by her into the service of the Confederacy, under requisition from you.

You have not thought proper in either of your letters, to give any reason why the State should be denied the exercise of this clear constitutional right. In this state of the case, you still exercise the appointing power which belongs to the State, and commission the officers who are to command these troops. The laws of this State give to these gallant men, the right to elect their own officers, and have them commissioned by the Executive of their own State. This question is of the more practical importance at present, on account of a large number of gallant officers belonging to these regiments, having lately fallen upon the battle field, whose places are to be filled by others. The troops volunteered at the call of the State, with a knowledge of their right to elect those who are to command them, and went into the field with the assurance that they would be permitted to exercise this right. It is now denied them under the Conscription Act. Some of them have appealed to me to see that their rights are protected. As an act of justice to brave men, who, by their deeds of valor, have rendered their names immortal, and as an act of duty, which, as her Executive I owe to the people of this State, I must be pardoned for again demanding for the Georgia State troops, now under your com-

mand, permission in all cases in which they have already been deprived of it, or which may hereafter arise, to have the *Company*, *Field* and *General* officers, who are to command them, appointed by election, and commissioned from the Executive of Georgia, as guaranteed to them by the constitution of the Confederacy and the laws of this State.

I make this demand with the greater confidence, in view of the past history of your life. I have not the documents before me, but if I mistake not, President Polk, during the war against Mexico, in which you were the Colonel of a gallant Mississippi regiment, tendered you the appointment of Brigadier General for distinguished services upon the battle field, and you declined the appointment upon the ground that the President had no right under the constitution, to appoint a Brigadier General to command the State volunteers then employed in the service of the United States, but that the States, and not the general Government, had the right, under the constitution, to make such appointments. If Congress could not at that time, confer upon the President the right under the constitution, to appoint a Brigadier General to command State troops in the service of the Confederacy, Congress certainly cannot now, under the same constitutional provisions, confer upon the President the right to appoint, not only the *Brigadier Generals*, but also all the field and company officers of State troops employed in the service of the Confederacy. May I not reasonably hope, that the right for which I contend, will be speedily recognized, and that you will give notice to the Georgia State troops, now under your control, who went into service under requisitions made upon the State by you, that they will no longer be denied the practical benefit resulting from the recognition.

You conclude your letter by saying, you "cannot share the alarm and concern about State Rights, which I so evidently feel." I regret that you cannot. The views and opinions of the best of men, are however influenced more or less by the positions in which they are placed, and the circumstances by which they are surrounded. It is probably not unnatural, that those who administer the affairs, and dispense the patronage of a confederation of States, should become, to some extent, biased in favor of the claims of the Confederacy, when its

powers are questioned; while it is equally natural that those who administer the affairs of the States, and are responsible for the protection of their rights, should be the first to sound the alarm. in case of encroachments by the Confederacy, which tend to the subversion of the rights of the States. This principle of human nature may be clearly traced in the history of the Government of the United States. While that Government encroached upon the rights of the States from time to time, and was fast concentrating the whole power in its own hands, it is worthy of remark, that the Federal Executive, exercising the vast powers and dispensing the immense patronage of his position, has seldom, if ever, been able to "share in the alarm and concern about State Rights," which have on so many occasions, been felt by the authorities and people of the respective States.

With renewed assurances of my high consideration and esteem, I am, very Respectfully,

Your ob't. Serv't.,

JOSEPH E. BROWN.